IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 175 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

AHEMADHUSSIN A CHANKI

Appearance:

1. Criminal Appeal No. 175 of 1989

MR KC SHAH APP for appellant

MR JC SHETH for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 27/02/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. By filing this Criminal Appeal under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short), appellant - State of Gujarat has questioned the legality, validity and propriety of the judgment and order dated December 1, 1988 rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.131 of 1988 acquitting the respondent ('the accused' for short) of the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short).

2. As per the prosecution case, on 19.6.1987, Jitendrasinh Kesarisinh Gohil, Police Sub Inspector, LCB, Godhra received information that the accused was doing the business of charas and ganja at Polan Bazar on the way to grave yard of Godhra. On receipt of this information, Gohil in the company of staff members together with two panchas raided the said place where the accused was entrapped with the bag in his hand. During search of the bag in the presence of panchas, packets wrapped in another paper were found. On opening the said packets, 60 grams of ganja and 15 grams of charas were found. During inquiry it was found that he was not having pass or permit to sell the contraband article. Therefore in the presence of panchas contraband articles 60 grams of ganja and 15 grams of charas were recovered and thereafter they were sealed. Complaint in this regard was filed by Unarmed Police Head Constable Udesinh Ramsinh. Thereafter it was sent for registration to Godhra Town Police Station where it was registered and pursuant to the same investigation was put into motion. The concerned PSI recorded the statements of the witnesses, sent the muddamal contraband articles to Forensic Science Laboratory ('the FSL' or short) for analysis. On receipt of the report of the analysis of the muddamal articles it was found that those muddamal articles were ganja and charas and, therefore, charge-sheet was filed in the Court of Chief Judicial Magistrate, Godhra for commission of the offence under section 18 of the NDPS Act against the accused.

3. On committal, the learned Additional Sessions Judge framed charge at Ex.2 against the accused which was read over and explained to him. He pleaded not guilty and claimed to be tried and hence he was tried in Sessions Case No. 131 of 1988 by the learned Additional Sessions Judge, Panchmahals at Godhra.

4. To prove the culpability of the accused, the

prosecution has examined in all seven witnesses and also produced three documents, complaint at Ex.13, Panchnama at Ex.8 and report of FSL at Ex.6 upon which heavy reliance was placed.

5. After recording of the evidence of the prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against him in the statements of the witnesses. Thereafter further statement of the accused was recorded under Section 313 of the Code. In the further statement also the accused denied the prosecution case in toto but he did not lead any evidence in his defence nor he examined himself on oath.

6. On appreciation, analysis and evaluation of the evidence of the prosecution, the learned Judge disbelieved the case of the prosecution in the premise that both the Panchas have not supported the prosecution case and because of the witnesses who were members of the raiding party their evidence contradicts with each other and according to the learned Additional Sessions Judge, prosecution has failed to prove charge against the accused and resultantly he acquitted the accused by the impugned judgment and order which has given rise to the present appeal.

7. We have heard Mr. K.C. Shah, learned APP for the appellant - State who has taken us through the entire collection of the record.

8. In our considered view, there is no substance in the appeal filed by the State. According to us, there is only the evidence of the police personnel themselves who were the members of the raiding party to suggest that contraband articles ganja and charas were seized from the accused. It is settled principles of law by catena of decisions that evidence of police officers and their companion of raiding party can be relied upon to base conviction if their evidence is consistent, natural, free from doubt and of a sterling quality. However, if their evidence is bristled with contradictions and police officers have not observed the statutory provisions contained under the NDPS Act, their evidence cannot be relied upon to base the conviction of the accused. In the instant case, according to us, evidence of the police officers are bristled with lot of contradictions. Each witness contradicts with other witness.

9. P.W.1, Yusuf Aiyub Mansuri, Ex.7 and P.W.2, Shabbir Mohmed Tapla, Ex.9 who were the panch witnesses

have been examined by the prosecution but they have not supported the prosecution case with respect to raid and search and seizure of the muddamal contraband articles charas and ganja.

10. P.W.6, Jitendrasinh Kesarisinh Gohil, whose evidence has been recorded at Ex.14 and who has arranged the raid, has deposed that in his presence contraband articles were recovered from the accused and thereafter complaint was filed by Udesinh Ramsinh, Police Head Constable, P.W.5, who has been examined at Ex.11. From their evidence it is seen that the complaint was recorded from 7.15 P.M. and thereafter it was sent for registration to Godhra Town Police Station which is produced at Ex.13. It is mentioned that the complaint was registered at 10.30 P.M. in Godhra Town Police Station. According to the evidence, Udesinh Ramsinh was immediately sent for registration of the complaint. The prosecution has not explained why, though Udesinh Ramsinh was sent immediately, there is a delay of three hours in registering the complaint. It is true that this delay cannot be called abnormal. However, in such type of cases prosecution ought to have explained why there is a time gap between the recording of the complaint and registration of the complaint.

11. Besides this, there is a contradiction in the evidence of Gohil. He has admitted in his oral testimony before the Court that he has not mentioned in the complaint about the recovery of 25 packets from the cloth bags. He has stated for the first time this fact before the Court. On having perusal of complaint at Ex.13 it is true that he has not mentioned about the recovery of 25 packets. According to us, this is a material contradiction. Therefore no reliance can be placed upon oral testimony of P.W.6, J.K.Gohil.

12. In this case, there is a clear non-observance of statutory provisions contained in section 52 (3) (a) of the NDPS Act. As per the statutory provisions contained in the NDPS Act, every person arrested and articles seized under sub-section (ii) of Section 41 and sections 42, 43 or 44 of the NDPS Act shall be forwarded without unnecessary delay to the officer in-charge of the nearest police station. In the instant case, Gohil has nowhere stated that where muddamal article was sent by him and in whose custody it was entrusted. The prosecution is totally silent on this aspect. Therefore it raises a serious doubt against the prosecution case.

13. It has also come in evidence that though raid was

carried out on 19.6.1987, contraband articles charas and ganja were sent to the FSL on 17.7.1987. The prosecution is totally silent on this point as to where during this period, that is, for 28 days the muddamal articles were kept. Therefore, the journey of muddamal seized to its reaching to the FSL has not been properly explained nor any witness who was entrusted with this muddamal to send the same to the FSL has been examined by the prosecution.

14. Lastly non-observance of provisions of Section 57 of the NDPS Act would give a fatal blow to the prosecution case. It is true that requirements of section 57 of the NDPS Act are not mandatory but are directory. As per section 57 of the NDPS Act the investigating officer has to make a full report of all particulars next after arrest or seizure within 48 hours to his immediate official superior. In the instant case the requirements contained in section 57 of the NDPS Act have not been complied with. Though requirements of Section 57 of the NDPS Act are directory in the absence of supporting or corroborative evidence to justify the prosecution case, non-compliance of said provisions vitiate the trial.

15. In this connection, it would be appropriate to refer to the judgment of the Supreme court in the case of Gurubax Singh v. State of Haryana, AIR 2001 SC 1002. In the said case, the Supreme Court has said that failure of investigating officer to make a full report of all the particulars, next after arrest or seizure within forty-eight hours thereof, to his immediate official superior as provided under Section 57 of the NDPS Act and where the conduct of panch witness is unusual as he offered himself to be a witness for search and seizure and contradiction as to nature of the seal used by the investigating officer, conviction of the accused under the circumstances was not proper.

16. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, at the cost of repetition be it stated that since the investigating officer has not complied with the said requirements, panchas have not supported prosecution case and in the evidence of the members of the raiding party including Gohil PSI there are lot of contradictions, the prosecution is unable to prove the charge levelled against the accused.

17. In view of the aforesaid state of affairs and having regard to the nature of evidence led by the prosecution witnesses which we have referred to in

earlier paragraphs of this judgment, it cannot be said that the learned Judge has committed any error in acquitting the accused of the offence with which he was charged.

18. This is an acquittal appeal in which the court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court and in our view the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi v. Bigendra Chaudhari, AIR 1967 SC 1124 and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.

19. In the case of Ram Kumar v. State of Haryana, AIR 1995 SC 280, Supreme Court has said that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379 of the Code are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal.

20. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the accused. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the accused and the learned APP has failed to dislodge the reasons given by

the learned Judge in order to convince us to take the view contrary to the one already taken by the learned trial Judge.

21. Seen in the above context, as this appeal lacks merit, deserves to be dismissed by confirming the judgment and order of acquittal which is impugned under the appeal.

22. For the foregoing reasons, the appeal fails and accordingly it is dismissed. As the accused is on bail, his bail bonds shall stand cancelled and sureties are discharged.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)

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